Nos. 70-666, 70-735

GRACE SLOAN, etc.,

Appellant,

and

DIAZ, *et al.*,

Intervenors-Appellants,

v.

ALTON J. LEMON, *et al.*,

Appellees.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania

BRIEF OF AMERICAN JEWISH COMMITTEE, AMERICAN JEWISH CONGRESS, ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, CENTRAL CONFERENCE OF AMERICAN RABBIS, NATIONAL COUNCIL OF JEWISH WOMEN AND UNION OF AMERICAN HEBREW CONGREGATIONS, *AMICI CURIAE*

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Supreme Court of the United States

October Term, 1972

Nos. 72-459, 72-620

GRACE SLOAN, etc.,

Appellant,

and

DIAZ, *et al.*,

Intervenors-Appellants,

v.

ALTON J. LEMON, *et al.*,

Appellees.

On Appeal from the United States District Court for the Eastern District of Pennsylvania

BRIEF OF AMERICAN JEWISH COMMITTEE, AMERICAN JEWISH CONGRESS, ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, CENTRAL CONFERENCE OF AMERICAN RABBIS, NATIONAL COUNCIL OF JEWISH WOMEN AND UNION OF AMERICAN HEBREW CONGREGATIONS, *AMICI CURIAE*

This brief *amici curiae* is submitted with the consent of the parties.

Statement of the Case

The statute under attack is Act 92 of the Laws of Pennsylvania, 1971, known as the Parent Reimbursement Act for Nonpublic Education, 24 P.S. §5701, *et seq.* (re-

ferred to herein as "the Act"). Section 2 of the Act recites as a "Legislative Finding" and "Declaration of Policy" that parents who send their children to nonpublic schools assist the State in reducing the rising costs of public education but that the "impact of inflation, plus sharply rising costs of education, now combine to place in jeopardy the ability of such parents fully to carry this burden." Should nonpublic school parents be forced by economic circumstances to transfer their children in substantial number to nonpublic schools, it is said, an enormous burden would be placed upon the public schools and upon the taxpayers of the state. Section 2 then estimates the economic consequences of such transfers and concludes that such costs would "be an intolerable public burden and present standards of public education would be seriously jeopardized." Therefore, "to reimburse parents partially for this service so vitally needed by the Commonwealth, and in order to foster educational opportunity for all children," the Act establishes a Parent Reimbursement Fund. The Fund is to be administered by the Pennsylvania Parent Assistance Authority consisting of five members appointed by the Governor.

Under the provisions of the Act, beginning July 1, 1971, 23% of the revenues collected under the Pennsylvania Cigarette Tax Act are to be paid into the State Treasury to the credit of the Parent Reimbursement Fund. Sums in the Reimbursement Fund are to be distributed to the parents of any child attending a nonpublic school within the state which fulfills the compulsory school attendance law and which meets the requirements of Title VI of the Civil Rights Act of 1964 (Public Law 88-352). Upon the filing

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of a verified statement by the parent at the end of the school year, a payment of $75 for each elementary school child and $150 for each secondary school child is to be made by the Authority not later than September 15 of the following school year. In the event the tuition paid or contracted to be paid is less than $75 or $150, the lesser sum is to be repaid.

Appellees, who are citizens, residents and taxpayers in Pennsylvania purchasing cigarettes in the state (one being also the parent of a Negro child attending public school), challenged the Act in the United States District Court for the Eastern District of Pennsylvania. Appellees' complaint, filed on September 13, 1971, contended that the Act on its face and as applied is a law respecting the establishment of religion in violation of the First and Fourteenth Amendments to the Constitution of the United States in that it finances religious instruction and worship; has as its purpose the advancement of religion; has as its primary effect the advancement of religion; gives rise to and intensifies political fragmentation and divisiveness on religious lines, and prefers those religions and sects which operate a parochial school system.

The complaint also alleged with respect to the First and Fourteenth Amendments that the Act on its face and as construed would prohibit the free exercise of religion in that it constitutes compulsory taxation for the support of religion and discriminates against and weakens those religions which do not choose to operate, or cannot afford to operate, a parochial system of education.

Finally, the complaint alleged that the Act violates the Equal Protection Clause of the Fourteenth Amendment to

the Constitution by perpetuating and promoting the segregation of the races.

The complaint sought the convening of a three-judge court to declare the Act unconstitutional and enjoin its enforcement and a preliminary injunction pending trial of the issues.

In November 1971, the appellant State Treasurer moved to dismiss, arguing that the Act was constitutional and that the complaint failed to show the Establishment Clause and Free Exercise claims ripe for decision. The appellant also denied that the Act resulted in discriminatory state action or invidious classification and asserted that insufficient facts were alleged to show such a claim ripe for decision. Finally, the appellant challenged appellees' standing to sue.

A three-judge court was impanelled. Parents of nonpublic school students were permitted to intervene on the ground that their claims and defenses were distinct from those of the State Treasurer.

On April 6, 1972, the three-judge court unanimously denied the motion to dismiss. In its opinion the court concluded that the Act violated the Establishment Clause because it unconstitutionally aided sectarian schools and supported religion by aiding parents in providing their children with a religious education. Having ruled that the Establishment Clause precluded state reimbursement of sums paid as tuition to schools providing religious education, the court did not consider the Free Exercise and Equal Protection claims of the complaint or arguments relating to standing.

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On May 2, 1972, appellant and parent-intervenors filed answers to the appellees' complaint. Appellees then moved for summary judgment which was granted by the three-judge court on July 21, 1972 in accordance with its opinion of April 6.

Interest of the *Amici*

This brief is submitted in behalf of the following national Jewish organizations:

American Jewish Committee
American Jewish Congress
Anti-Defamation League of B'nai B'rith
Central Conference of American Rabbis
National Council of Jewish Women
Union of American Hebrew Congregations.

Each of these organizations is concerned with preservation of the security and constitutional rights of Jews in America through preservation of the security and constitutional rights of all Americans. They are committed to the belief that separation of church and state is the surest guarantee of religious liberty and has proved of inestimable value both to religion and to the community generally. They submit this brief because they believe that the program provided for in the statute under review is a form of aid to religious institutions, bringing in its train the evils that the constitutional guarantee of separation of church and state was designed to prevent.

In addition, these organizations, which have consistently fought for equal opportunities for all, regardless of race,

color, creed or national origin, and which have always opposed racial segregation in schools, believe that grants of public funds to private schools as authorized by the Act would adversely affect the public schools and thereby stimulate the trend toward racial segregation in the schools of Pennsylvania, with private schools attended almost exclusively by white pupils and the public schools attended by most of the nonwhite children. The *amici* view this effect of the Act as a violation of the Equal Protection Clause of the Fourteenth Amendment.

Questions to Which This Brief Is Addressed

This brief *amici curiae* is addressed to the following questions:

1. Does the Act violate the Establishment Clause of the First Amendment because it does not have a valid secular purpose or effect?

2. Does the Act violate the Establishment Clause because it fosters an excessive governmental entanglement with religion?

3. Does the Act, in so far as it authorizes the payment of public funds to those private schools that are racially segregated, violate the Equal Protection Clause of the Fourteenth Amendment?

4. Does the appellee Lemon have standing to raise the question as to Equal Protection?

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Summary of Argument

I. The Act violates the Establishment Clause of the First Amendment because it has neither a valid secular purpose nor an effect which does not advance religion.

A. The court below accepted the legislative findings in the Act as virtually precluding inquiry into its legislative purpose. In light of clear evidence that the purpose of the Act is to keep religious schools in existence as religious institutions, such blind acceptance of the legislative findings to the contrary has the effect of nullifying the constitutional requirement that legislation assisting religious institutions have a secular legislative purpose.

B. The tuition payments provided for by the Act constitute an indirect form of governmental aid to nonpublic schools, most of which are religiously affiliated. They therefore violate the constitutional prohibition of governmental action which has the effect of advancing religion. There is no significant difference between the tuition grants involved here and direct financing of sectarian schools out of tax-raised funds.

II. The Act violates the Establishment Clause because it fosters an excessive government entanglement with religion, both administrative and political. The aid plan embodied in the present Pennsylvania law has the same potential for political divisiveness along religious lines as the plans previously stricken down by this Court. This is particularly true with respect to the danger of entanglement of religion and government in the political process.

III. In so far as the Act authorizes the payment of public funds to private schools that are racially segregated, it violates the Equal Protection Clause of the Fourteenth Amendment.

A. There is ample evidence that the private schools which are beneficiaries of funds under the Act are racially segregated.

B. The use of public funds to maintain and perpetuate such racial segregation is prohibited. The tuition reimbursement formula embodied in the Act constitutes such an illegal use of public funds.

IV. Appellee Lemon, the father of a black child in a Pennsylvania public school, has standing to raise the question of equal protection.

ARGUMENT

POINT I

The Act violates the Establishment Clause of the First Amendment because it has neither a valid secular purpose nor a primary effect which does not advance religion.

The precise meaning of the Freedom of Religion and No-Establishment Clauses of the First Amendment, like other broad constitutional guarantees, has always been and may always be subject to dispute. Nevertheless, since this Court's now classic formulation of the reach of the Establishment Clause in *Everson* v. *Board of Education*, 330 U.S.

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1 (1947), certain tests of constitutional validity have accumulated under which particular programs must be assayed.

Chief Justice Burger stated in *Lemon* v. *Kurtzman, Earley* v. *DiCenso,* 403 U.S. 602, 612 (1971):

> In the absence of precisely stated constitutional prohibitions, we must draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz* v. *Tax Commission,* 397 U.S. 664, 668 (1970).

Three main tests, the Chief Justice continued, could be gleaned from prior cases (at 612-13):

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education* v. *Allen,* 392 U.S. 236, 88 S. Ct. 1923, 1926, 20 L. Ed. 2d 1060, 1065 (1965); finally, the statute must not foster "an excessive government entanglement with religion." *Walz, supra,* at 674, 90 S. Ct. at 1414, 25 L. Ed. 2d at 704.

In *Lemon-DiCenso,* this Court invalidated, on the ground of excessive "entanglement," statutes in Pennsylvania and Rhode Island providing for use of state funds to pay for carefully defined secular aspects of the operations of religiously affiliated schools. The two Acts, with their elaborate provisions for state supervision to insure that the money was not used for sectarian purposes, had quite obviously been designed on the assumption that transfer of public funds to such schools, directly or indirectly, was barred by the Establishment Clause. This was true either under the oft-repeated interpretation of that Clause in

Everson v. *Board of Education,* 330 U. S. 1, 16 (1947) that "no tax in any amount, large or small, can be levied to support any religious activities or institutions," or under the more recent statement in *Walz* v. *Tax Commission,* 397 U. S. 664, 668 (1970) barring "financial support" of religious activity.

In *Lemon,* this Court found that the provisions in the two statutes designed to avoid the appearance of "financial support" of religious activities had created undue entanglement which rendered the statutes invalid. The present Pennsylvania statute, like others enacted since *Lemon,* attempted to avoid the strictures of that opinion by giving financial assistance to the schools, via parents and children, on the theory that the entanglement hurdle was the only obstacle to validation. We submit that this attempt cannot succeed. The new Pennsylvania law, by limiting administrative entanglement, has provided for the simple, though indirect, transfer of state funds to religiously affiliated schools, with no restraints on their being used for religious purposes. Such a transfer must necessarily have both a religious purpose and a religious effect and must therefore violate two of the tests laid down in *Abington School District* v. *Schempp,* 374 U. S. 203 (1963) and reaffirmed in *Walz* and *Lemon-DiCenso, supra.*

In a number of recent lower court decisions, it has been pointed out that there is no way around the dilemma created by the purpose and effect and the entanglement tests since the less the state attempts to restrict and control public funds to escape the entanglement prong, the greater the likelihood that the state supplied funds will be used

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for religious as well as secular purposes. See, *e.g.*, *Wolman* v. *Essex*, 342 F. Supp. 399, 414 (S.D. Ohio 1972), *aff'd, mem.* 93 S. Ct. 61 (1972); *Americans United for Separation of Church and State* v. *Oakey*, 339 F. Supp. 545, 549-50 (D. Vt. 1972).

There is nothing surprising about this. It is merely a reflection of the fact, taken for granted until quite recently, that the Constitution bars government from resorting to any device to use its resources to finance religious institutions.

A. The Sectarian Purpose

In the case at bar, the court below concluded that the Act expressed a "legitimate secular objective consistent with the Establishment Clause," basing its conclusion upon the stated legislative purpose of the Act: to aid parents to continue to send their children to nonpublic schools, thereby fostering educational opportunities for both public and nonpublic schools. *Lemon* v. *Sloan, et al.*, 340 F. Supp. 1356, 1360 (E.D. Pa., 1972). The court also took note of legislative findings expressed by the General Assembly and its declaration of policy that present standards of public education would be seriously jeopardized if parents of nonpublic school children could no longer afford tuition costs and were forced to send their children to public schools. The court then accorded this stated legislative intent "appropriate deference" and declared that the Act passed the first test of a "secular purpose."

We note also that this Court in *Lemon* v. *Kurtzman*, *supra*, accorded similar deference to the stated legislative

intent of the Acts there considered, although they were nevertheless invalidated on other grounds. In discussing the secular legislative purpose test, the court said it had no reason to believe that the Pennsylvania and Rhode Island Legislatures meant anything other than they said, and that nothing before the Court undermined those stated legislative intents (403 U.S. at 613).

We submit, nevertheless, that, notwithstanding traditional deference to the legislatures, it would be naive to unquestionably accept as the purpose of any Act whatever language the draftsmen put in the preamble. To decline even to consider piercing the veil of a state's legislative intent is to permit subversion of the Constitution through the recitation of a formula preamble or statement of purpose.

It can hardly be denied that the Pennsylvania Legislature, in enacting the Pennsylvania Reimbursement Act for Nonpublic Education, was concerned not with standards of *public* education, but with the continued existence of the parochial schools of that state. We have been repeatedly told that parochial schools everywhere are in financial difficulties. We know that legislation has been enacted in numerous states for the very purpose of preserving these schools. It should not be necessary to review the impassioned pleas of parents and school officials, particularly as reported in the press, urging that aid be given so that church-related schools may remain financially viable. The plea is *for* the church-related schools, which are felt by those pressing for government aid to be the cornerstone of their church's mission. If the public schools are mentioned at all in these pleas, it is only in warnings that, if

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public aid is not forthcoming, the public schools will be inundated by students from private institutions forced to close their doors. This threat, we submit, is speculative. Its validity has not yet been demonstrated in any state.

We submit that the court below erroneously passed over the question whether the Act does indeed have a secular purpose. More broadly, we suggest that this Court spell out more clearly the meaning of the "secular purpose" test, lest it become deadletter. The lower courts appear to be treating it as such.

Thus, in *Wolman* v. *Essex, supra,* a three-judge court held (342 F. Supp. at 411) that Ohio's Parental Reimbursement statute satisfied the secular purpose test because nonpublic schools perform in substantial part a strictly secular function. The state was also said to have a legitimate concern in requiring minimum standards in all of its schools and the Ohio statute was passed with the express purpose of helping nonpublic schools maintain these standards. The court then commented, in footnote 13 (at 411), that, in its opinion, "the first prong of the *Lemon* test will almost invariably be satisfied in cases of this type and may not truly exist as a distinct, dispositive requirement."

Similarly, in *Committee for Public Education and Religious Liberty* (*PEARL*) v. *Nyquist,* 350 F. Supp. 655, 660 (S.D.N.Y. 1972), probable jurisdiction noted, 93 S. Ct. 962 (1972), District Judge Gurfein, writing for the majority, stated: "In sum, we do not go behind the statements of the New York Legislature, although it is manifest that, regardless of the variety of secular arguments advanced to

support the legislation, *the prime legislative concern is to see that religious parochial schools do not go under for lack of financial support.*" (Emphasis added.)

We submit that the "purpose" test laid down by this Court should not be treated so cavalierly and that, where a "prime legislative concern" to preserve religious schools through the use of government resources is clear, it should not be ignored merely on the basis of *pro forma* recitations in legislative findings. Moreover, while a state surely has a legitimate concern in requiring minimum standards in all schools, it is not the business of the state, we submit, to provide public funds to enable schools established for religious purposes to maintain such standards. To allow the state to do this would deprive the "secular purpose" test of meaning.

B. The Sectarian Effect

The court below struck down the Act under the second prong of the *Lemon* test. It concluded that the effect of the Act was to aid religious schools and that the failure of the state to insure that funds were restricted to secular education or general welfare services rendered the Act unconstitutional (at 1364). It observed that the legislative findings and declaration of policy acknowledged that this type of aid would have the *effect* of enabling nonpublic schools, including church-related schools, to continue to operate (at 1363), even though it failed to hold that this was the *purpose* of the Act.

Nevertheless, the language of the opinion below lends credibility and support to our argument above concerning

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purpose. In the portion of its opinion considering the effect of the Act (at 1364), the court stated:

> If parents cannot afford to pay the tuition, they must take their child out of the nonpublic schools and if enough parents are unable to pay these costs, the schools will be forced to close. It was precisely this possibility that led the Pennsylvania General Assembly to pass the Act under review. By providing parents with additional funds because they have paid tuition at nonpublic schools, the Commonwealth is trying to insure the continued ability of the parents to afford tuition costs and therefore the continued existence of nonpublic schools, including sectarian schools.

Be that as it may, the opinion below concluded, first, that sectarian schools would be aided by state funds under the Act and, second, that the Act also unconstitutionally supported religion because it aided parents in providing a religious education for their children. We submit that both of these analyses are correct.

It is beyond dispute that tuition reimbursement will facilitate and promote the enrollment of children at church-related schools, schools which constitute an integral part of the religious mission of the sponsoring churches. It was argued below by appellants that, in the absence of earmarking, one could not ascertain that payments under the Act would encourage such enrollment. The lower court quite rightly rejected that contention, saying (at 1364):

> It is clear that a possible and quite likely use of the aid under review is to enable parents to continue to pay tuition at sectarian schools. Tuition payments support both religious and secular education at these schools. The mere fact that the Act does not require

> that parents use the funds to pay tuition at church-related schools does not relieve the state of its duty to preclude the use of its funds to support religious activities.

This statement was bottomed on the conclusion of this Court in *Tilton* v. *Richardson*, 403 U.S. 672, 682-84 (1971), that a government aid program can be invalidated on the basis of a significant risk that the aid may serve to support religious activity at some future time.

Wolman v. *Essex, supra,* which should be dispositive of the instant case, declared (342 F. Supp at 416) that:

> The state cannot claim it does not know what the parents will do with their grants, for the expressed intent of the statute is to "reimburse parents of nonpublic school children for a portion of the financial burden experienced by them" in sending their children to parochial schools. It does not matter that the parents are subsequently free to use the money received for any purpose. The intent of the statute in providing the reimbursement must speak for itself. (Citations omitted.)

The *Wolman* opinion noted that, during the 1970-71 school year, 98% of the students attending nonpublic schools in Ohio attended denominational schools and that approximately 95% attended Catholic schools. Similarly, the Report of the New York State Commission on the Quality and Financing of Elementary and Secondary Education disclosed that 93% of private school students attend religious schools. In Pennsylvania, 96.6% of private school pupils attend church-affiliated schools.[1] It is a matter of

1. Statistics on Nonpublic Elementary and Secondary Schools, 1965-1966, Office of Education, U.S. Dept. of Health, Education and Welfare, OI-210111.

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public cognizance that of students attending church-affiliated schools, in state after state, one organized religious group is the predominant beneficiary of all parochiaid legislation. (See also *Americans United for Separation of Church and State* v. *Paire,* 348 F. Supp. 506, 509-10 (D.N.H. 1972)).

The lower court in *Wolman,* which invalidated Ohio's tuition reimbursement statute, thought that the second prong of the *Lemon* test, the principal or primary effect of the statute, was really a restatement of the neutrality test, first discussed in *Everson, supra,* and later reformulated in *Abington School District* v. *Schempp,* 374 U.S. 203 (1963). "One method of gauging neutrality, in terms of the Religion Clauses," said the *Wolman* opinion, "is to observe the class to which it is directed and that will be affected by it." Although the court did not base its holding entirely upon the second prong of the *Lemon* test, it observed that (at 412):

> In all the cases in which the Court has upheld legislation attacked on Establishment Clause grounds, the affected class has been substantially broader than the class affected by the Ohio statute. * * * In each of these cases religiously affiliated institutions were among a broad class of beneficiaries deriving benefits of a general, broad-based, public policy. These cases are truly analogous to situations in which the state provides police and fire protection generally to all people and property, within its jurisdiction, regardless of religious affiliation.

Thus, the breadth of the class to be benefited is of overriding importance.

In the case at bar, the lower court took care to stress that it could perceive no constitutional difference in whether payments were made directly to the church-related school, indirectly using parents as a conduit, or in the form of reimbursement to parents with dollars that need not necessarily be used at the educational institution. For, said the court with careful logic (at 1365):

> The economic consequences are the same for the church-related school whether it receives funds through a direct grant, a conduit plan or because the state increases family incomes through a reimbursement program which enables the parents to continue to pay tuition. In each case, tax-raised funds are being used to subsidize religious education.

There is ample precedent for this reasoning. In fact, state courts have invariably invalidated tuition grant plans in which public funds were to be paid to parents. See *Almond* v. *Day*, 197 Va. 419, 89 S.E. 2d 851 (1955); *Hartness* v. *Patterson*, 179 S.E. 2d 907 (S. Carolina 1971); *Swart* v. *South Burlington School District*, 122 Vt. 177, 167 A. 2d 514, *cert. den.* 366 U.S. 925 (1961); *Opinion of the Justices*, 259 N.E. 2d 564 (Mass. Sup. Jud. Ct., 1970). Similarly, the three-judge court in *Wolman, supra*, whose holding was affirmed by an 8 to 1 vote of this Court, stated (342 F. Supp. at 415):

> Payment to the parent for transmittal to the denominational school does not have a cleansing effect and somehow cause the funds to lose their identity as public funds. While the ingenuity of man is apparently limitless, the Court had held with unvarying regularity that one may not do by indirection what is forbidden directly; one may not by form alone contradict the substance.

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(The *Wolman* opinion then went on to recall that a variant of the indirection principle was attempted in certain Southern states where monetary grants were made to parents or students for use at so-called "private schools." These attempts to avoid the constitutional obligation to desegregate the public schools of these states were uniformly disallowed. See, e.g., *Griffin* v. *School Board of Prince Edward County*, 377 U.S. 218 (1964); *Lee* v. *Macon County Board*, 267 F. Supp. 458 (1967), *aff'd sub nom. Wallace* v. *United States*, 389 U.S. 215 (1967); *Poindexter* v. *Louisiana Financial Assistance Commission*, 296 F. Supp. 686 (1968), *aff'd* 393 U.S. 17 (1968). Although these decisions rejecting tuition grants arose under the Equal Protection Clause, rather than the Establishment Clause or its state equivalents, the principle is analogous. As Justice Douglas noted in *Abington, supra*, 374 U.S. at 230, "[I]t is the use to which public funds are put and not to whom they are provided that is controlling.")

The *Wolman* opinion concluded (342 F. Supp. at 417) that, "Since the potential ultimate effect of the scheme is to aid religious enterprises, the Establishment Clause forbids its implementation regardless of the form adopted in the statute for achieving that purpose." That is precisely the point we wish to emphasize.

It is clear from *Lemon-DiCenso* that payments of public funds may not be made directly to religious schools, and no one would now argue the constitutional validity of direct money grants to such institutions. Nevertheless, it is argued that the strictures of *Lemon-DiCenso* may be avoided either if sums are paid to parents functioning as

conduits or channels to the religious schools, or if sums are paid to parents in reimbursement for tuition paid without any requirement that they actually be used for payment of tuition.

We submit, however, that *Wolman* stands for the common-sense proposition that it is irrelevant what method the state uses to advance religious enterprises, when the economic consequences are the same for all concerned. This point was also made by Judge Hays in *PEARL* v. *Nyquist, supra,* dissenting opinion, at 675, when he said:

> There is no essential difference between a parent's receiving a $50 *reimbursement* for tuition paid to a parochial school and his receiving a $50 *benefit because* he sends his child to a parochial school. In both instances the money involved represents a charge made upon the state for the purpose of religious education. [Emphasis in original.]

It is also important to remark upon the unanimous holding of the three-judge Federal District Court in Ohio which had before it a tax credit plan for nonpublic school parents following *Wolman's* invalidation of the parental reimbursement statute. In the Ohio tax credit case, entitled *Kosydar* v. *Wolman,* Civil Action No. 72-212 and *Wolman* v. *Kosydar,* Civil Action No. 72-222, the court reaffirmed the *Wolman* holding that direct monetary grants to the parents of nonpublic school children violate the First Amendment, and then proceeded to a consideration of whether the state may nevertheless, through its taxing machinery, confer benefits by way of tax credits upon a class of persons composed of nonpublic school parents and an additional minor segment of the public school population. (In re-

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sponse to language in the *Wolman* opinion, an attempt was made to broaden the class of recipients for aid under the new tax credit legislation. These recipients included persons enrolled in home instruction programs, in public adult high school continuation programs and in schools for tubercular persons; persons enrolled in vocational and basic literacy programs; persons paying non-resident public school tuition payments; and students enrolled in public or private programs for the deaf, blind, crippled, emotionally disturbed, neurologically handicapped or mentally retarded. However, the benefited class, as the court noted, was nonetheless of a predominantly sectarian character.) Again, for the reasons outlined in *Wolman,* the court held the tax credit statute unconstitutional.

Said the court (at 25, Slip Opinion):

> It simply defies reason to say that such a statute does not aid sectarian schools. Such aid may be less direct and less capable of precise measurement than a grant to the schools themselves; yet, if some parents will now be able to send their children to these schools or if fewer parents already utilizing them will be forced to withdraw their children, they will be aided.
>
> * * *
>
> We hold that where, as here, the recipient of state conferred benefits is a predominantly sectarian class of schools and therefore as a matter of law the primary effect of such benefits is to advance religion, then the form of these benefits, whether by tax credits, exemptions or deduction, cannot alone insulate them from First Amendment infirmity. * * * The exaltation of form over substance no longer has any place in our jurisdiction. (Citations omitted.)

POINT II

The Act violates the Establishment Clause because it fosters an excessive governmental entanglement with religion, both administrative and political.

In *Lemon-DiCenso, supra,* this Court invalidated Pennsylvania and Rhode Island Acts because the "cumulative impact of the entire relationship arising under the statutes in each State involves excessive entanglement between government and religion" (at 614). Having so concluded, this Court found it unnecessary to decide whether legislative precautions under each Act restricted the primary effect of the programs to the point where they did not offend the Religion Clauses.

Entanglement was found in *Lemon* in part, but only in part, because of the close government supervision of church schools required by the Pennsylvania and Rhode Island statutes. Equally important were other considerations which apply with equal force here. Thus, this Court referred not only to the administrative entanglement aspect but also to entanglement of religion and government in the political process. It said (at 622-3):

> * * * In a community where such a large number of pupils are served by church-related schools, it can be assumed that state assistance will entail considerable political activity. Partisans of parochial schools, understandably concerned with rising costs and sincerely dedicated to both the religious and secular educational missions of their schools, will inevitably champion this cause and promote political action to achieve their goals. Those who oppose state aid, whether for con-

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stitutional, religious, or fiscal reasons, will inevitably respond and employ all of the usual political campaign techniques to prevail. Candidates will be forced to declare and voters to choose. It would be unrealistic to ignore the fact that many people confronted with issues of this kind will find their votes aligned with their faith.

Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect. Freund, Comment, Public Aid to Parochial Schools, 82 Harv. L. Rev. 1680, 1692 (1969). The potential divisiveness of such conflict is a threat to the normal political process. Walz v. Tax Commission, *supra,* at 695, 90 S. Ct., at 1424 (separate opinion of Harlan, J.). See also Board of Education v. Allen, 392 U.S., at 249, 88 S. Ct., at 1929 (Harlan, J., concurring); Abington School District v. Schempp, 374 U.S. 203, 307, 83 S. Ct. 1560, 1616, 10 L. Ed. 2d 844 (1963) (Goldberg, J., concurring). To have States or communities divide on the issues presented by state aid to parochial schools would tend to confuse and obscure other issues of great urgency. * * *

The present Pennsylvania plan for aiding sectarian schools is just as productive of "political division along religious lines" as the one condemned in *Lemon.* Whatever form government aid to church schools may take—salary supplement plans as in *DiCenso,* tuition reimbursement as in this case, or tax credits as in other cases now before this Court—the level and even the existence of the state support will be a public issue at every election and during each legislative session. This can be prevented only if it is made

clear that the Constitution bars all forms of government aid to religiously affiliated schools.

Certainly, there is no reason to believe that enactment of any one bill will eliminate the issue from the public sphere. There will always be pressure to raise or to lower the amount of the reimbursement allowance, the tax credit or whatever form of allotment may be devised.

This has already been illustrated in Pennsylvania. In 1971, the state legislature provided that 23% of the revenues collected under the Pennsylvania Cigarette Tax Act should be paid into the State Treasury to the credit of the Parent Reimbursement Fund beginning in July 1971. The 1972 legislature amended the Act to provide that 10% of such revenues collected be paid into the Parent Reimbursement Fund. However, the original bill introduced that year (H.B. 2150) proposed that 5% of the revenues collected be credited to the the Reimbursement Fund. Obviously, neither 23%, 10% nor 5% is a fixed, immutable figure. It is conceivable, even likely, that upward revisions will be necessitated by inflationary pressures. But even without inflation advocates of state aid are bound to seek constant raising of the level of aid until they reach their candidly stated goal of "parity," under which the state would spend the same amount for secular education of each child in nonpublic schools as it spends on each public school child. Surely, as this Court pointed out in *Lemon-DiCenso,* these are the very evils the First Amendment sought to avoid.

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POINT III

Insofar as the Act authorizes the payment of public funds to private schools that are racially segregated, it violates the Equal Protection Clause of the Fourteenth Amendment.

A. The private schools which are beneficiaries of funds under the Act are racially segregated.

The allegations contained in the complaint, which must be taken as true in this phase of the case, include the following in paragraph 11:

> The Act on its face and as construed and applied by the defendant authorizes and directs payments for the tuition of students in educational institutions which by purpose or effect segregate students by race, thereby perpetuating and promoting the segregation of races and two separate school systems in Pennsylvania—a public school system predominantly black, poor and inferior and a private subsidized school system predominantly white, affluent and superior.

There is ample reason for believing that these allegations can be substantiated on trial. Available evidence shows that the non-church-related schools in Pennsylvania and the non-Catholic church-related schools were all virtually 100-per-cent white. The Catholic parochial school system, while it contains a substantial proportion of black students, is nevertheless largely segregated.

The periodical, *Commonweal,* in its October 7, 1966 issue, quoted the following statement of Richardson Dil-

worth, former Mayor and former School Board President in Philadelphia (p. 13):

> Today, in our city, 40 per cent of the total school population is in parochial and private schools. The result is that while only 30 per cent of our city's population is non-white, 57 per cent of our public school pupils are non-white. And, today, there are more white children in parochial and private schools than there are in our city's entire public school system.

The following facts are set forth in the 1967 Report of the United States Commission on Civil Rights entitled "Racial Isolation in the Public Schools" (p. 31):

> Private and parochial school enrollment, which is overwhelmingly white, also is a significant factor in the increasing separation of white and Negro school children.
>
> * * *
>
> In 1960, of the more than four million pupils enrolled in non-public elementary schools in the United States, only 140,529 were non-white. 44,308 non-whites were attending non-public secondary schools which had a total enrollment of more than one million.

The Report says further (pp. 38-39):

> Private and parochial school enrollment also is an important factor in the increasing concentration of Negroes in city school systems. Non-public school enrollment constitutes a major segment of the nation's elementary and secondary school population. Nationally, about one-sixth of the total 1960 school enrollment (Grades 1-12) was in private schools. In metropolitan areas the proportion is slightly higher, and divided unevenly between city and suburb. Nearly one-third more elementary school students in the cities at-

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> tend nonpublic schools than in the suburbs. Almost all of them are white. In the larger metropolitan areas the trend is even more pronounced. * * * [A] much higher proportion of white city students than white suburban students attend private and parochial elementary schools. Nonwhites in these metropolitan areas, whether in cities or suburbs, attend public schools almost exclusively.

A table, following this statement, shows the following proportion of total elementary students, by race, in public and nonpublic schools, for 15 metropolitan areas in 1960 (p. 39):

Central Cities	*White*	*Nonwhite*
Public Schools	61%	94%
Nonpublic Schools	39%	6%
Suburbs	*White*	*Nonwhite*
Public Schools	75%	97%
Nonpublic Schools	25%	3%

Since the issuance of the Civil Rights Commission Report more recent figures for Philadelphia have become available.

In the city of Philadelphia proper in January 1971, 63.6% of the total enrollment in public schools was nonwhite (including Spanish-speaking). This contrasts sharply with the situation in the Catholic parochial schools in the Archdiocese of Philadelphia which includes four adjacent counties. There, in September 1971, only 8.4% of the elementary students and 5.1% of the secondary students were nonwhite (including Spanish-speaking).[2]

2. Excluded from these figures is the relatively small number of non-Catholics attending Catholic parochial schools, because their racial breakdown is not given. (Non-Catholic pupils comprised 2.1% and .3% respectively, of the pupils attending Catholic elementary and secondary schools).

These figures are derived from "Enrollment: Negro and Spanish Speaking in the Philadelphia Public Schools—1970-71" by the Office of Research and Evaluation of the School District of Philadelphia and from "The Report of the Archdiocesan Advisory Committee on the Financial Crisis of Catholic Schools in Philadelphia and Surrounding Counties" by John T. Gurash, Chairman of the Committee, 1972.

The foregoing figures illustrate, as to both Pennsylvania and the United States generally, that enrollment of black children in private schools is very low and far below the ratio of blacks in the total population.

The result, of course, is that the percentage of white children in public schools is considerably lower than it should be on the basis of the white-black ratio in the population. Many public schools, even in racially mixed neighborhoods, are becoming Negro schools because of the movement of white children to private schools. This leads, in effect, to a dual system of schools—the public schools attended predominantly by blacks and the private schools, mainly parochial schools, attended predominantly by whites.

B. The use of public funds to maintain and perpetuate racial segregation is prohibited.

In *Brown* v. *Board of Education of Topeka*, 347 U.S. 483 (1954), this Court declared racial segregation in public education to be a denial of the equal protection guaranteed by the Fourteenth Amendment. It held unconstitutional the dual system under which whites and Negroes were required to attend different schools in a number of Southern states.

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A year later, in its implementing order, this Court required public school boards to abolish such dual school systems and to effectuate the transition to racially non-discriminatory school systems. 349 U.S. 294, at 301 (1955). In subsequent decisions, this Court reaffirmed its decisions in *Brown I* and *Brown II* and made it clear that the time has run out for efforts to delay school integration. *Cooper* v. *Aaron,* 358 U.S. 1 (1958); *Griffin* v. *County School Board of Prince Edward County,* 377 U.S. 218 (1964); *Green* v. *County School Board of New Kent County,* 391 U.S. 430 (1968); *Raney* v. *Board of Education of the Gould School District,* 391 U.S. 443 (1968); *Monroe* v. *Board of Commissioners of the City of Jackson, Tenn.,* 391 U.S. 450 (1968); *Alexander* v. *Holmes County Bd. of Ed.,* 396 U.S. 19 (1969); *Swann* v. *Charlotte Mecklenburg Bd. of Ed.,* 402 U.S. 1 (1971).

In *Brown I,* this Court based its conclusion that the dual system is unconstitutional on the discrimination which is inherent in a separation of pupils by race. The Court said (374 U.S. at 494):

> To separate them [Negro pupils] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely to be undone.

This Court has not yet decided the question whether a school system which does not require whites and blacks to attend different schools but where, as a result of a segregated residential pattern, white and black pupils to a large extent attend different schools, amounts to a dual

system which is in conflict with the Equal Protection Clause of the Fourteenth Amendment as interpreted in *Brown I and II*. This problem of so-called "de facto" segregation is one of the issues in *Keyes* v. *School District No. 1, Denver, Colorado,* 445 F.2d 990 (1971), which is now before this Court. Cert. granted, 92 S.Ct. 707 (1972).

However, plaintiffs in this action do not attack the pattern of segregation which results from the operation of private schools, *per se*. The thrust of their complaint is directed against the state which, by providing financial aid to parents sending their children to private schools and thus helping to maintain and perpetuate the pattern of segregation resulting from the existence of these schools, engages in discriminatory state action.

There is no question that the authorized payment of public monies is state action. *Cooper* v. *Aaron,* 358 U.S. 1, 19 (1958); *Poindexter* v. *Louisiana Financial Assistance Commission,* 258 F. Supp. 158, 162 (E.D. La. 1966); *Poindexter* v. *Louisiana Financial Assistance Commission,* 275 F. Supp. 833, 854 (E.D. La. 1967), *aff'd,* 389 U.S. 571 (1968). *Green* v. *Connally,* 330 F. Supp. 1150, 1164 (1971). In fact, it is hard to imagine any action which can be attributed to the state more closely and intimately than the authorized payment of state funds. The crucial question then is whether payment of state funds to reimburse parents for payment of tuition to private, including parochial, schools under the Act is discriminatory state action.

There is ample authority for the proposition that public aid to private schools or to pupils attending private schools

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which serves to support racially segregated education constitutes denial of equal protection in violation of the Fourteenth Amendment. This Court said in *Cooper v. Aaron, supra* (358 U.S. at 19):

> State support of segregated schools through any arrangement, management, funds or property cannot be squared with the [Fourteenth] Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws.

Repeatedly, Federal courts have struck down on the same ground state plans to provide for tuition grants for students attending private schools. *Bush* v. *Orleans Parish School Board,* 187 F. Supp. 42, 188 F. Supp. 916 (E.D. La. 1960), *aff'd,* 365 U.S. 569 (1961); *Hall* v. *St. Helena Parish School Board,* 197 F. Supp. 649 (E.D. La. 1961), *aff'd,* 368 U.S. 515 (1962); *Poindexter II, supra,* 275 F. Supp. 833; *Coffey* v. *State Education Finance Commission,* 296 F. Supp. 1389 (S.D. Miss. 1969); *Gilmore* v. *City of Montgomery,* 337 F. Supp. 22 (1972).

The principle that the use of public funds to support activities by private persons or groups which involve racial discrimination denies equal protection is applied also in fields other than education. See, *e.g., Simkins* v. *Moses H. Cone Memorial Hospital,* 323 F.2d 951 (4th Sir. 1963);[3] *Eth-*

3. In *Simkins,* Negro physicians complained that government funds were given to two hospitals which discriminated against them because of their race. They did not seek an injunction against public support of discrimination or segregation, but an injunction against the discriminatory conduct of the recipients of the funds. In the present case, in contrast, plaintiffs do not seek an injunction against discriminatory conduct of the schools, but an injunction against state support of discrimination. Either remedy is suitable to eliminate a violation of the Fourteenth Amendment prohibition of using public funds to maintain racial discrimination and segregation.

ridge v. *Rhodes*, 268 F. Supp. 83 (S.D. Ohio 1967). And see Executive Order No. 11246, September 24, 1965, 30 F.R. 12319, on equal employment opportunity, and Executive Order No. 11063, November 24, 1962, 27 F.R. 11527, on equal opportunity in housing. See also Section 601 of the Civil Rights Act of 1964 prohibiting racial discrimination under any program or activity receiving Federal financial assistance. 42 U.S.C. 2000d.

In some of the cases cited above, courts found that grants of public funds were made for the purpose of evading desegregation of public schools and perpetuating racial segregation. But such a discriminatory purpose is not a prerequisite for holding that a grant aiding an educational institution directly or indirectly is in violation of the Equal Protection Clause. All that is required is that the grant has the *effect* of maintaining, promoting or perpetuating segregation.

In *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 725 (1961), this Court said:

> * * * no State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be. It is of no consolation to an individual denied the protection of the laws that it was done in good faith. Certainly the conclusions drawn in similar cases by the various Courts of Appeals do not depend on such a distinction.

And see cases there cited (*Id.* at 725, n.2).

Applying this principle, it was held in *Poindexter II*, *supra*, that the fact that grants to private schools had the effect of "assisting whites to flee to private schools," 275

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F. Supp. at 856, provided an independent ground for the holding that the state law authorizing such grants was unconstitutional. After stating that the purpose of the act involved in that case was discriminatory, the court continued: "We hold *also* that Act 147 of 1962 is unconstitutional in its actual effect." *Id.* at 857 (emphasis added).[4]

Hence, all that appellees in the present case have to allege—as they have done—and to prove—if and when the case goes to trial—is that aid given to nonpublic schools, including parochial schools, under the Act promotes racial discrimination and segregation in the affected schools. It can be said, in addition, that the effect of the Act is to "encourage" parents of white children to leave public schools and thus to aggravate and perpetuate patterns of racial segregation in education. See *Reitman* v. *Mulkey*, 387 U.S. 369 (1967).

Returning to *Burton, supra,* the applicability of the "state action" concept to this case is not affected by the language in that opinion stating that "private conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to have become involved in it." 365 U.S. at 722. The "significant involvement" doctrine of *Burton* would apply in the present case only if appellees sought a judgment restraining the

4. Also relevant in this connection is *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). That case arose under Title VII of the Civil Rights Act of 1964 which prohibits discriminatory employment practices. 42 U.S.C. 2000e *et seq.* In discussing this prohibition this Court made it clear that whether a given practice is discriminatory does not depend on motivation by the employer but on the consequences of the practice in question.

affected schools from discriminating or segregating on a racial basis. Only then would the question arise as to whether the state involvement in the school operation as a result of its providing funds is so significant that such operation becomes state action. But the thrust of the complaint in the present case is directed at the state because of the aid it gives to the parents of children attending those schools; as mentioned before, there can be no question that such aid constitutes state action regardless of whether the amounts given are small or large. (See *Poindexter II, supra,* 275 F. Supp. at 854, where it was said that "the payment of public funds in any amount through a state commission under authority of a state law is undeniably state action.")

POINT IV

Appellee Lemon has standing to raise the question of Equal Protection.

In order to claim invalidity of the Pennsylvania Act under the Equal Protection Clause of the Fourteenth Amendment, appellees or at least one of them must have standing to raise this issue. *Baker* v. *Carr,* 369 U.S. 186, 204 (1962); *Barrows* v. *Jackson,* 346 U.S. 249, 255 (1953). Alton J. Lemon, one of the appellees, we submit, has such standing.

Lemon is the father of a black child attending a public school in Pennsylvania. It is alleged in the complaint that the Act on its face and as construed and applied by defendants perpetuates and promotes the segregation of races in violation of the Fourteenth Amendment.

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Thus, appellee Lemon in this action vindicates the constitutional right of his child not to be subjected to segregated education. Hence, he has standing under the basic rule that a person may vindicate his own constitutional rights. *Barrows* v. *Jackson, supra.* See also *Poindexter I, supra,* and *Griffin* v. *State Board of Education,* 239 F. Supp. 560, 562 (E.D. Va. 1965); see also Note, Federal Tax Benefits to Segregated Private Schools, 68 Colum. L. Rev. 922, 952-54 (1968). Lemon's position in this matter is no different from that of plaintiffs in *Alexander* v. *Holmes County Board of Ed., supra,* and the other cases on desegregation and integration decided by this Court. In each of these cases, plaintiff Negroes claimed that they and their children were directly affected by discrimination and segregation in public schools. Like the plaintiffs in those cases, Lemon and his child have "a personal stake in the outcome of the controversy." *Baker* v. *Carr, supra,* cited in *Flast* v. *Cohen,* 392 U.S. 83, 99 (1968).

Therefore there is no need in the present case to carve out a special exception to the general rule as was done in *Barrows* v. *Jackson, supra,* where a white person was granted standing to complain that the enforcement of a restrictive covenant against a Negro deprived the latter of the equal protection of the laws. Instead, the general rule applies, under which a person may claim standing in this Court to vindicate his constitutional rights.

If Lemon had no standing to bring the present action, there would be no possible way of contesting the grants made under the Act on the ground that they constitute a violation of the equal protection of Negro children in the public schools. Obviously, neither the schools which re-

ceived state aid nor the children attending such schools can be expected to contest the grants.

Maintenance of constitutional government requires that there be some way of testing the constitutionality of laws and administrative acts. Otherwise the very foundation of our Constitution would be subverted. *Marbury* v. *Madison*, 1 Cranch 137 (1803).

The rules governing standing should be given a liberal interpretation to facilitate the review of laws and administrative acts as to their constitutionality. It is for these reasons that the *amici* believe that appellee Lemon should be held to have standing to raise the constitutional question based on the Equal Protection Clause.

Conclusion

It is respectfully submitted that the decision below should be affirmed.

Respectfully submitted,

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